

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JOSEPH BECHTEL,

Defendant-Appellant.

UNPUBLISHED

May 13, 1997

No. 182400

Kent Circuit Court

LC Nos. 94-001643-FH;

94-001902-FH

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

PER CURIAM.

Defendant pleaded guilty of possession with intent to deliver marijuana, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), and first-degree retail fraud, MCL 750.356c; MSA 28.588(3). For those respective convictions, he was sentenced to thirty to forty-eight months' imprisonment and six to twenty-four months' imprisonment, to be served consecutively. He appeals as of right. We remand. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant first argues that the trial court erred in scoring Prior Record Variable 5 as ten points because the prior misdemeanor convictions were constitutionally infirm. We hold that the PRV 5 was properly scored. A review of defendant's presentence investigation reports reveals that he had at least four prior misdemeanor convictions which could be considered by the court. Specifically, defendant's January 29, 1988 conviction for larceny under \$100 could be considered because, even if defendant was not represented by counsel, it did not result in incarceration. *People v Justice*, 216 Mich App 633; 550 NW2d 562 (1996). Also, except for the first shoplifting offense in Arizona, we hold the remaining shoplifting, escape and disorderly conduct convictions could be considered because, as we

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**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

read the notations in the presentence investigation report, defendant merely asserts that he was not represented by counsel. He failed to provide prima facie evidence that the convictions were violative of *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994). That defendant's trial counsel offered to submit prima facie proof to the trial court, but did not, does not satisfy the requirements for obtaining a *Tucker/Moore*¹ hearing.

Next, defendant contends he is entitled to resentencing because the trial court based its sentencing decision, at least in part, on constitutionally infirm prior misdemeanor convictions. A defendant satisfies his burden of presenting prima facie evidence of constitutionally infirm misdemeanor convictions where the presentence investigation report contains a notation to the effect that the defendant was without counsel and yet received a term of incarceration. *People v Alexander (After Remand)*, 207 Mich App 227; 523 NW2d 653 (1994). Here, because the presentence investigation reports indicate that several misdemeanor convictions which resulted in incarceration were obtained without counsel, we remand to the trial court to determine whether the constitutionally infirm misdemeanor convictions played a part in its sentencing decision. If they did not, defendant's sentences shall be affirmed. If they did, defendant is entitled to either resentencing without consideration of the infirm convictions or a *Tucker/Moore* hearing to determine the validity of the convictions (after which, if the convictions are determined to be infirm, defendant shall be resentenced).

Defendant's argument regarding the trial court's scoring of Offense Variable 8 is not preserved for appellate review. Defendant did not object to the trial court's scoring of that variable either in his attorney's letter to the court or at the time of sentencing. The argument is therefore waived on appeal. *People v Eaves*, 203 Mich App 356, 358; 512 NW2d 1 (1994). The trial court's reference to OV 8 at the sentencing hearing appears to be a misstatement considering that the court was discussing defendant's objections to the scoring of OV 25 at the time.²

Finally, defendant argues that his trial counsel and his first appellate attorney were ineffective for not raising the issues which defendant now raises before this Court. Because Offense Variables 8 and 25 were properly scored, defendant's attorneys were not ineffective regarding that issue. *People v Rodriguez*, 212 Mich App 351, 355-356; 538 NW2d 42 (1995). Further, as to the scoring of Prior Record Variable 5, defendant has not shown that he was prejudiced by the court's consideration of allegedly constitutionally infirm prior convictions since he has yet to offer any prima facie proof that the convictions were in fact infirm. As to the trial court's possible consideration of infirm convictions which were supported by prima facie proof, counsel was not ineffective since counsel brought these to the attention of the court. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Moreover, any delay in raising the issues is also not a basis for finding that counsel was ineffective. *Id.*

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Daniel F. Walsh
/s/ Robert P. Griffin
/s/ Walter P. Cynar

¹ *United States v Tucker*, 404 US 443; 92 S Ct 589; 30 L Ed 2d 592 (1972); *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974).

² It appears that the trial court did not file a corrected copy of the Sentencing Information Report after it changed its scoring decision. On remand, we direct the trial court to file a corrected copy of the SIR, if it has not already done so.